In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 794

JAMES R. HOFFA, PETITIONER,

v.

UNITED STATES OF AMERICA

No. 795

THOMAS EWING PARKS, PETITIONER,

v.

UNITED STATES OF AMERICA

No. 796

LARRY CAMPBELL, PETITIONER,

v.

UNITED STATES OF AMERICA

No. 797

EWING KING, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTIONS TO DEFER CONSIDERATION OF PETITIONS FOR WRITS OF CERTIORARI.

This memorandum is submitted in response to petitioners' motions, filed by petitioner Hoffa on January 4, 1966, and adopted by the other petitioners on the fol-

lowing day, to defer consideration of the instant petitions until after the Court of Appeals for the Sixth Circuit hears argument on and decides their appeals from the denial of their second motion for a new trial and they (or the government) are given an opportunity to seek review in this Court of the determination made by the court of appeals. Petitioners assert that a question presented in those appeals is related to one of the 21 issues in the present petitions because both involve charges that the government "spied" on defense meetings. We submit that no delay is warranted.

1. The petitions and the pending appeals are not interrelated in any meaningful sense because the underlying factual questions are distinct and the principal legal issues are different. The allegation that Robert D. Vick was communicating to the government defense secrets which he learned while he was employed by one of Hoffa's attorneys was denied by the government in its response to the second motion for a new trial.[1]

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[1] The indictment in this case was filed on May 9, 1963. The printed record on the new trial motion (which we are filing with the Clerk of this Court and to which we refer as "R.") reflects that thereafter Vick communicated with agents of the F.B.I. on two occasions. On June 3, 1963, he informed an agent that he planned to do investigative work for Z. T. Osborn, Jr., Hoffa's attorney, in connection with the pending case (R. 52a-53a). On June 14, 1963, he said that he wanted to cooperate with the government and make information available. He was told that "since he was in the employ of an attorney for James Riddle Hoffa and others who have been indicted in this matter, * * * the F.B.I. would not solicit information from him or direct his activities in this area in any manner" (R. 54a). Vick then said that "he would not volunteer any further information and that this would be the last time he would make the above offer" (R. 55a). Vick did no work for Osborn other than "one small assignment" (R. 72a) between the end of June and the end of October 1963. In

That factual issue neither depends on the factual issue presented in these petitions—*i.e.*, whether Edward G. Partin intruded upon the "councils of the defense" in the Test Fleet trial—nor does its presentation assist in the proper disposition of the issue presented here.

Moreover, the district court's decision on the second motion for a new trial, which appears as Appendix A at pp. 7-16, *infra*, involves only legal issues which are totally unrelated to those presented in the petitions now under consideration. The court's reasons for denying the motion were that the evidence was not newly discovered within the meaning of Rule 33 of the Federal Rules of Criminal Procedure; that the defendants had failed to exercise reasonable diligence in discovering the information presented; and that a new trial would not, in any event, remove the alleged "taint of interference" (p. 12, *infra*) since Vick's activities, such as they were, had terminated well before the trial

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August, Vick told Osborn that he had communicated with Walter J. Sheridan, a Department of Justice official, and that he would do no further work for Osborn (R. 8a). Vick spoke to Sheridan on four occasions (R. 85a). He told Sheridan at their first meeting on August 21, 1963, that Osborn had made attempts improperly to influence jurors in the Test Fleet trial and that he was planning similar attempts in the forthcoming trial (R. 85a-86a). Sheridan told Vick he was interested in information of illegal activity (R. 56a), and his notes of their conversations dealt with "past and anticipated illegal, corrupt and obstructive activity by Mr. Osborn" (R. 89a). Vick was again employed by Osborn late in October 1963, and he was instrumental in gathering the evidence on which Osborn was subsequently convicted of endeavoring, early in November 1963, to obstruct justice in the forthcoming trial of the instant case. See *Osborn* v. *United States*, No. 724, this Term. On November 16, 1963, Osborn was told by District Judge Gray that Vick had reported his illegal activity to law-enforcement officials (R. 79a). Petitioners' trial, during which they were represented by other attorneys, began on January 20, 1964.

began. The validity of these legal propositions can neither affect nor be affected by the issue presented in the instant petitions.

2. Even if the pending appeals and the instant petitions had one or more issues in common, that circumstance would not, we believe, warrant any delay in this Court's disposition of the petitions. In essence, petitioners are seeking to delay the termination of this litigation until appellate consideration of their post-trial motions is concluded. This is precisely the abuse which this Court warned against in *United States* v. *Johnson*, 327 U.S. 106, 112, where it noted that the privilege of filing motions for a new trial "might lend itself for use as a method of delaying enforcement of just sentences."

The indictment in this case was filed in May 1963, and trial did not begin until January 1964, after petitioners had filed a host of pre-trial motions and had successfully postponed the trial date by seeking interlocutory review in the court of appeals and in this Court. Oral argument on their appeals from the convictions in March 1964 was not heard until December of that year, petitioners having been afforded substantial extensions of time in which to file their brief. On the eve of argument in the court of appeals, the claims made in the second motion for a new trial were presented to the court of appeals as a reason for postponing argument and remanding the case to the district court. The court of appeals denied that motion, and petitioners then filed their papers in the form of motions for a new trial in the district court. The motion to defer now made in this Court seeks to achieve the

same result as the motion made in the court of appeals—*i.e.*, to delay disposition on direct review of petitioners' convictions until the second motion for a new trial is ruled on by the lower courts. This is contrary to the procedure contemplated by Rule 33 of the Federal Rules of Criminal Procedure, which authorizes the district court to consider and deny motions for a new trial without delaying appellate review.[2] It is particularly inappropriate when, as here, one of the district court's reasons for denying the motion was that the defendants were not diligent in seeking out the alleged newly discovered evidence.

The delay in this case would be substantial. We have been informed by the Clerk of the Court of Appeals for the Sixth Circuit that petitioners' appeals from the denial of their second motion for a new trial will not be reached for argument until the court's April session, which will begin on either March 28 or April 4, 1966.

3. Petitioners do not suggest how they might be unfairly prejudiced if these petitions are considered by the Court without further delay. The merits of the appeals now pending in the Court of Appeals for the Sixth Circuit would obviously be unaffected by this Court's disposition of the petitions. This Court's future review of whatever decision the court of appeals may render would not be hindered by disposition of

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[2] Petitioners have also filed a third motion for a new trial, which was denied by the district court and is now on appeal to the Sixth Circuit. Since petitioners have undertaken to present their summaries of the allegations (pp. 17-20 of the Motion to Defer), we attach the district court's opinions in that proceeding as Appendices B and C, pp. 17-39, *infra*.

the present petitions nor would it be facilitated by deferring consideration of these petitions until review of the court of appeals' decision is sought.

4. No other reason for deferring consideration of the petitions exists. The issues here are distinguishable from those in *Sheppard* v. *Maxwell,* No. 490, this Term, for the reasons stated at pages 31-32 of our brief in opposition. They are distinguishable from the questions presented in *Miranda* v. *Arizona,* No. 759, this Term; *Vignera* v. *New York,* No. 760, this Term; *Westover* v. *United States,* No. 761, this Term; and *Johnson and Cassidy* v. *New Jersey,* No. 762, this Term, because each of those cases involve interrogation of an *arrested* suspect in the absence of counsel with respect to a crime which he is accused of having committed at an earlier time. Statements made by defendants to Partin and introduced into evidence in this case were uttered long before arrest and were made in the course of committing the offenses. The Sixth Amendment right to the assistance of counsel at issue in the above cases is not involved here.

We respectfully submit that the motions to defer and the petitions for writs of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

JANUARY, 1966.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

Criminal No. 11,989

UNITED STATES OF AMERICA

vs.

JAMES R. HOFFA, ET AL.

OPINION

(April 15, 1965)

This case is before the Court upon a motion for new trial filed December 18, 1964, on behalf of the defendant, James R. Hoffa. The motion was duly adopted by the defendants, Thomas Ewing Parks, Larry Campbell, and Ewing King. After response by the Government, the motion was supplemented and thereupon a supplemental response was filed by the Government.

The present motion purports to be based upon newly discovered evidence. The trial of this case commenced upon January 20, 1964, and a verdict was returned by the jury upon March 4, 1964, finding each of the said defendants guilty upon one or more counts. Thereafter a motion for a new trial was duly filed and upon consideration was overruled. The case is at this time upon appeal. Prior to the filing of the present motion for a new trial in this court, a similar motion was filed in the Court of Appeals with a request that the case be remanded to this court for hearing upon the motion and that the hearing upon appeal be stayed pending the disposition of the motion in this court. The motion to remand and to stay the appeal was denied. Thereupon the present motion was filed in this court.

As stated above, the motion purports to be based upon newly discovered evidence and is made in accordance with Rule 33 of the Federal Rules of Criminal Procedure. In support of the motion the defendants have filed the affidavits of William E. Buffalino, Sidney Simpson, Rena Mae Booth, Lester Bloomenstiel, and Z. T. Osborne, Jr., together with portions of the testimony of Robert D. Vick and exhibits relating to his testimony in a trial in the United States District Court at Nashville, Tennessee, involving Z. T. Osborne, Jr., as the defendant. It is the contention of the defendants that matters set forth in the affidavits and exhibits constitute newly discovered evidence and that the matters therein set forth establish a violation of the defendant's constitutional right to due process, right to assistance of counsel, right to protection from unreasonable searches and seizures, right against self-incrimination, and the right to effective compulsory process. In response to the defendants' motion, the Government has denied the matters set forth in support of the defendants' motion constitute newly discovered evidence, has denied that they set forth evidence legally sufficient to entitle the defendants to a new trial, and has filed the affidavits of Walter J. Sheridan, Edward Grady Partin, and William Hawk Daniels in denial of the matters set forth in the defendants' affidavits.

Under Rule 33 of the Federal Rules of Criminal Procedure, this Court is without jurisdiction to grant the motion for new trial pending the appeal except upon remand of the case. However, a trial court does have jurisdiction to hear the motion and determine whether a request for remand should be made.

The defendants have set forth two principal grounds in support of their motion. It is first contended that the defendants have obtained newly discovered evi-

dence of the activities of one Robert D. Vick which would establish that he acted as a secret agent of the Government while working for Z. T. Osborne, Jr., an attorney for the defendant, James R. Hoffa, during the period of time when the case was being prepared for trial. It is contended that this newly discovered evidence would establish a violation of the constitutional rights of the defendants under the Fourth, Fifth, and Sixth Amendments warranting the granting of a new trial. The affidavits of Z. T. Osborne, Jr., and portions of the record of the Osborne trial relating to Robert D. Vick are filed in support of this ground of the motion. The Government has filed the affidavit of Walter J. Sheridan in opposition to this ground in the motion.

The second principal ground in the defendants' motion is the contention that the defendants have obtained newly discovered evidence of the activities of Edward Grady Partin, a principal Government witness, in concealing witnesses and suppressing testimony, thereby denying the defendants due process and the effective right to compulsory process under the Fifth and Sixth Amendments of the Constitution. The affidavits of Sidney Simpson, William E. Buffalino, Lester Bloomenstiel, and Ruby Mae Booth are filed in support of this contention. The Government has filed the affidavits of Grady Partin and William Daniels in opposition to this ground in the motion.

The law with respect to the granting of a new trial upon the ground of newly discovered evidence is well established. In general, the criteria ordinarily required for the granting of a new trial for newly discovered evidence are that (1) it must appear from the motion that the evidence relied upon is, in fact, "newly discovered evidence," that is, discovered after the trial; (2) the motion must allege facts from which

the Court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) the evidence relied upon must be material to the principal issues involved; and (5) the evidence must be such as, on a new trial, will probably produce an acquittal. *Pitts* v. *U. S.* (C.A. Alaska, 1959), 263 F. 2d 808, cert. den. 360 U. S. 919, rehearing denied 361 U. S. 857. See also cases cited in note 28, Rule 33, Federal Rules of Criminal Procedure, Title 18 U. S. C. A.

With respect to the first ground in the defendants' motion, relating to the alleged denial of the defendants' constitutional rights by reason of the activities of Robert D. Vick in reporting to the Government information obtained in the course of his employment as an investigator for Z. T. Osborne, who was an attorney at the time for the defendant, James R. Hoffa, it is represented that this is newly discovered evidence which was not discovered by Mr. Osborne until the date of his own trial in May of 1964, some two months after the trial of the principal case, and that the legal significance to the defendants of this evidence was not appreciated until November of 1964. The Government contends that this is not newly discovered evidence, but cites only matters outside the record in support of this contention. The record, however, is almost completely devoid of any showing of due diligence upon the part of the defendants in obtaining this evidence. Nothing appears in the defendants' motion as to why, with reasonable diligence, this information could not have been discovered and presented prior to the trial in this case. All that appears is that the full extent of Mr. Vick's reporting to the Government was not known to the defendants until the time of Mr. Osborne's trial in May of 1964 and the theory as to the legal significance of his having

reported was not conceived until November of 1964. A newly discovered legal theory does not of course constitute newly discovered evidence. 66 C. J. S., "New Trial," Section 101. There is no showing that the fact of Mr. Vick's having reported to the Government was not known to the defendants prior to the trial of this case. On the contrary, the fact that it was known by the defendants that Mr. Vick had reported to the Government upon the activities of Mr. Osborne is established in the motions filed by the defendants prior to the trial seeking a continuance and change of venue due to Mr. Osborne's withdrawal as counsel for the defendant, James R. Hoffa, following revelations by Mr. Vick and following publicity incident thereto. The defendants entered upon the trial of this case fully aware of the fact that Mr. Vick had worked for Mr. Osborne and had reported to the Government with reference to at least some of the alleged activities of Mr. Osborne as counsel for the defendant and that this had caused the defendant, Mr. Hoffa, to obtain other counsel. This could not be newly discovered evidence to the defendants. The failure of the defendants to develop more fully the activities of Mr. Vick in this respect, prior to the trial, if unknown and considered relevant, can only be considered as due to a lack of reasonable diligence.

Furthermore, it is the opinion of the Court that the evidence with respect to Mr. Vick's activities would not warrant a granting of a new trial even if it were considered newly discovered and its non-discovery by the time of the trial were through no lack of diligence on the part of the defendants. To entitle the defendants to a new trial, it must appear that the new evidence, if undisputed and believed, would have been sufficient if produced at the time of the trial to have been reasonably expected to have changed

the results of the original trial. That is, under the circumstances of the present case it must be sufficient to have entitled the defendants to a new trial if it had been presented at the time of the trial. Even though the new evidence were held sufficient to establish a violation of the defendants' constitutional rights, as alleged, it could not upon any theory have resulted in an acquittal of the defendants. Under the cases of *Caldwell* v. *U. S.*, 205 F. 2d 879 and *Copelon* v. *U. S.*, 191 F. 2d 749, which cases are relied upon by the defendants in support of their motion, the effect of Mr. Vick's activities could at most entitle the defendants to a new trial, not an acquittal. Under the *Caldwell* and *Copelon* holdings, where interference with the right to counsel has been established, a new trial would then be held at which the defendant would have effective and uninterfered with assistance of counsel. The original interference with the defendant's right to counsel has never been held to so contaminate the case as to require an acquittal or to require a succession of new trials. The defendants are only entitled to a trial at which the interference with the right to counsel has been removed. In the present case, not only was there no reference in the trial to any matters in any way related to the matters alleged to have been reported by Vick to the Government, but even if the activities of Vick were held to be an interference with the defendants' constitutional rights, a more effective removal of the taint of interference could not be accomplished upon the granting of a new trial than was here accomplished before the commencement of the defendants' trial. For the legal counsel with respect to whom the interference was alleged to have occurred was himself no longer in the case after the alleged interference and before the trial of the case and was no longer an attorney for the defendant at the time of the trial. There

was no alleged interference on the part of Vick with any counsel who participated in the trial of the case. A more complete removal of any taint of interference could not be accomplished by the granting of a new trial.

With respect to the second ground in the defendant's motion, relating to the alleged denial of the defendants' constitutional rights by reason of the activities of witness Edward Grady Partin in seeking to conceal records and witnesses from the service of process, it is represented that this was newly discovered evidence that was not known unto the defendants until the prospective witness, Sidney Simpson, was willing to talk to the defendants in September of 1964 and his affidavit was taken in December of 1964. The affidavit of Simpson is in all matters sharply disputed by the counter-affidavits of Edward Grady Partin and William Hawk Daniels. However, accepting the Simpson affidavits as establishing the facts for the purpose of the present motion, the matters in the affidavits filed in support of the second ground in the defendants' motion would not constitute grounds for granting a new trial. The fact that the defendants were denied the effective use of process, if it is a fact, could not but have been known to the defendants at the time of the trial and could not be considered newly discovered evidence. If witnesses could not be located, or when located declined to talk, or if process could not be served, these are matters that must have been known at the time of the trial. In such event a party must have raised these issues at the time of the trial. 66 C. J. S., "New Trial," Section 103 (b).

Additionally, each of the affiants whose affidavit is now relied upon as providing newly discovered evidence was known to the defendants at the time of the trial. The affiants, William Buffalino, Lester Bloomenstiel, and Rena Mae Booth, were each witnesses who testified

for the defendants upon the trial. Mr. Buffalino was an attorney for Mr. Hoffa. The affiant, Sidney Simpson, appeared at the trial in response to a subpoena but allegedly declined to discuss his knowledge of Edward Grady Partin with Mr. Buffalino, although the record is not clear on this and only states that he was instructed by Mr. Partin not to talk and an associate of Mr. Simpson's, a Mr. Tucker, advised him in Mr. Buffalino's presence that he was not required to talk, whereupon, "Buffalino asked me to sit down until he talked to the other lawyers so that he could see when I would be needed. I did not hear from Buffalino after that." The record does not reflect that a diligent inquiry was made at the time of the trial. The omission of counsel to interrogate a witness as to a fact is no ground for a new trial. *Darnell* v. *Nichols,* 22 Tenn. App. 287, 122 S. W. 2d 808.

> "The failure of applicant to inquire what a person supposed to have knowledge of a matter in controversy knew about it or to call or examine him as a witness is not excused ordinarily by the fact that their relations were unfriendly or that the witness was believed to be hostile." 66 C. J. S., "New Trial," Section 105.

The evidence proffered as newly discovered evidence in support of the second ground of the motion for new trial is at most only impeaching testimony. Further, it is cumulative impeaching testimony. The affiant, Sidney Simpson, represents in his affidavit that (1) the Government witness, Partin, sought to conceal witnesses and records that might be impeaching as to him, including seeking to dissuade Simpson from testifying; (2) the Government witness, Partin, over a period of time was a user of narcotics; (3) the Government witness, Partin, had stated that he would "frame" the

defendant, Hoffa, to secure the dismissal of a criminal charge against himself. The affidavits of Mr. Buffalino, Mr. Bloomenstiel, and Mrs. Booth, each of whom testified at the trial, do not purport to add any new evidence. Mr. Buffalino in his affidavit sets forth the effort made to obtain the Simpson testimony. The affidavits of Mr. Bloomenstiel and Mrs. Booth merely purport to corroborate some item in the Simpson affidavit.

It is apparent that the evidence now offered as new evidence relates exclusively to the impeachment of the Government witness, Partin. It does not otherwise relate to the substance of the charges against the defendants. It is entirely collateral to these charges. Moreover, impeachment testimony of the same nature was offered by the defendants at the trial, and the testimony of Simpson would be merely cumulative. The law is well settled that neither impeaching nor cumulative testimony is sufficient to entitle a party to a new trial when offered as newly discovered evidence. *Mesorash* v. *U.S.*, 352 U.S. 1; *Amos* v. *U.S.* (C.C.A., D.C., 1954), 218 F. 2d 44; *Hale* v. *U.S.* (C.C.A. 6, 1933), 67 F. 2d 673; *Baird* v. *U.S.* (C.C.A. 6, 1922), 279 F. 509; 39 *Am. Jur.*, "New Trial," Sections 167 and 170. As stated in the case of *Ashe* v. *U.S.* (C.C.A. 6, 1961), 288 F. 2d 725 at page 733:

> "Among other criteria ordinarily required for the granting of a new trial for newly discovered evidence, are that the new evidence must not be merely cumulative and that it be such that on a new acquittal."
> trial such evidence would probably produce an

The defendants have requested an oral hearing upon their motion. However, the motion was fully briefed, with response being filed to the Government brief. It is well settled that a motion for new trial may be de-

cided on affidavits without the calling of witnesses. *U.S.* v. *Johnson,* 327 U.S. 106; *U.S.* v. *On Lee,* 201 F. 2d 722; *U.S.* v. *Troche,* 213 F. 2d 401. Where it is apparent upon the face of the affidavits, when accepted as establishing the facts therein set forth, and wholly disregarding the counter-affidavits, that the motion is without merit, the motion can properly be decided upon the record and the briefs and reply briefs of the parties.

The motion for new trial will accordingly be overruled and no request for remand of this cause will be made.

An order will enter accordingly.

FRANK W. WILSON,
United States District Judge.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

Criminal No. 11,989

UNITED STATES OF AMERICA

vs.

JAMES R. HOFFA; THOMAS EWING PARKS; LARRY CAMPBELL AND EWING KING

OPINION

(September 22, 1965)

The defendants were convicted on March 4, 1964, of willfully endeavoring to influence, intimidate and impede jurors in the discharge of their duties, in violation of the Federal Obstruction of Justice Statute (18 U.S.C., Sec. 1503). Upon appeal the convictions were affirmed by the Court of Appeals by a unanimous opinion filed July 29, 1965. The case is now before this Court upon a motion for a new trial alleging newly discovered evidence and upon a motion filed by the defendant Hoffa, and subsequently joined by the other defendants, seeking to disqualify the undersigned as the presiding judge and alleging bias at the time of the trial. This motion to disqualify is based upon a purported affidavit obtained 18 months after the trial and within a few days after the United States Court of Appeals affirmed the conviction of the defendants. The affidavit purports to be that of a woman who identiges herself as one Marie Monday and who, in further affidavits in support of the motion for new trial, identifies her occupation as that of a prostitute who frequented the rooms of the jurors. The affidavit repre-

sents that someone who identified himself as the presiding judge in the trial of the defendant Hoffa, and whom she now identifies as such, visited her at the Read House Hotel where the jury was quartered during the course of the trial in January and February 1964 and confided in her that he was biased against the defendant Hoffa.

The Government has filed a motion to strike the motion to disqualify.

The affidavit upon which the motion to disqualify is based is a complete and total fabrication and fraud. The facts are:

(1) The undersigned has never known nor ever been introduced to the person described in the purported affidavit as Marie Monday, nor has the undersigned ever had any conversation with such a person at *any* time or place about *any* subject, including *any* matter relating to the trial of James R. Hoffa or any defendant in this case.

(2) The undersigned was never in nor in the vicinity of the Read House Hotel, Chattanooga, Tennessee, during the entire course of the trial of the case of *United States of America* vs. *James R. Hoffa, et al,* extending from January 20, 1964, through March 6, 1964, and including the date of sentencing upon March 12, 1964, having deliberately avoided going there for any purpose during the said trial in view of the fact that the jury trying the case was quartered and sequestered at the said hotel.

(3) The undersigned has never made the statement "that he was in charge of the Hoffa trial" or that "Hoffa was going to get what was coming to him this time and he was going to see to it that he did" or "don't you worry, he is going to be convicted because he (Wilson) was in charge of it," nor anything bearing any resemblance to such statements to *any* person at

any time or in *any* place, including the person identified as Marie Monday, the place identified as the Read House Hotel, and the time identified as during the course of the trial of this case.

(4) The undersigned has never held any bias or prejudice nor acted as a result of any bias or prejudice against the defendant, James R. Hoffa, nor against any defendant in this case, nor has he held any bias or acted as a result of any bias in favor of the prosecution. Each and every action of the Court is a matter of record in the case and was taken solely on the basis of the evidence and in accordance with the law, irrespective of the party or parties affected thereby. For example, this Court directed a verdict of acquittal for the defendant, James R. Hoffa, at the conclusion of the evidence upon one count upon which the Court deemed that the evidence was insufficient to submit to the jury. The record of the trial and each action of the Court has now been carefully and fully reviewed by the United States Court of Appeals and found to be free of error.

The defendants contend, however, that the truth or falsity of the affidavit is irrelevant and cannot be asserted to defeat the motion to disqualify. As unusual as this may seem, this is a correct statement of the present law under 28 U.S.C. 144, upon which the motion to disqualify is based.

This statute provides as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to her such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

In the case of *Berger* v. *United States*, 255 U.S. 22, 65 L.Ed 481, 41 S.Ct. 230, with three justices dissenting, the Court held that under the language of the foregoing section, upon the filing of an affidavit of personal bias or prejudice against a judge, the truth or falsity of the facts asserted cannot be passed upon but that, regardless of whether the judge is in fact biased or prejudiced, he must assume the facts as stated in the affidavit to be true and pass only upon the legal sufficiency of the affidavit and motion. See also *Taylor* v. *United States*, 179 F.2d 640; *Refior* v. *Lansing Drop Forge Co.*, 124 F.2d 440.

However, even though the falsity of the affidavit is not permitted to be asserted as a basis for denying the motion to disqualify, and even though the fact of bias is not required to exist, the statute makes other requirements before a judge is to be declared disqualified. One of these requirements is that "a party may file only one such affidavit in any case." In this case the defendant, James R. Hoffa, filed such an affidavit against Judge Frank Gray under date of December 10, 1963. Although Judge Gray held the affidavit legally insufficient to require his disqualification, he nevertheless withdrew from the case. It was as a consequence of the withdrawal of Judge Gray following the filing of the affidavit against him that the undersigned was

designated to try the case. Having heretofore filed one such affidavit, in accordance with the express provisions of the statute, the defendant is not permitted to file a second against another judge. Otherwise, the defendant could file successive motions and affidavits to disqualify each judge designated to try the case and thereby prevent any disposition of his case.

As stated in the case of *Allen* vs. *duPont*, 75 F.Supp. 546 at page 549:

> "If the affidavit filed in this case is to prevail, conceivably every judge in the federal system might in monotonous succession be given the same sort of passport and our judicial procedure be rightly made the subject of ridicule and contempt."

See also *United States* vs. *Buck*, 23 F.Supp. 508 and *Martin* vs. *Texas Indemnity Ins. Co.*, 214 F.Supp. 477. As stated by the Court in the latter case at page 480:

> "28 U.S.C.A., Section 144, imposes a bag limit of one judge for a party to disqualify by the character of motion under consideration here."

In the second place, the statute requires that the affidavit be filed "not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." In the present case the motion was filed, as mentioned above, 18 months after the trial of the case and within a few days after the conviction of the defendant had been affirmed upon appeal.

In the case of *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 57 L.Ed 1379, 33 S.Ct. 1007, the Court held that Section 21 of the Judicial Code (the forerunner of the present Section 144) "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are review-

able otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."

This was re-affirmed in the case of *Berger* vs. *United States,* 255 U.S. 22, 65 L.Ed. 481, 41 S.Ct. 230, in the following language:

> "The section permits only the affidavit of a party and *Ex parte American Steel Barrel Co.,* supra, decides that it must be based upon facts antedating the trial, not those occurring during the trial."

See also *Knapp* vs. *Kinsey,* (C.C.A. 6, 1956) 232 F.2d 458, wherein the Court held that Section 144, Title 28 U.S.C., is not directly applicable to proceedings wherein the claimed bias or prejudice appears during the course of the trial.

In the case of *Ex parte Glasgow,* 195 F. 780, the Court held that Section 21 of the Judicial Code (the forerunner of Section 144) did not authorize an affidavit to disqualify a judge from ruling on motions in arrest and for new trial. See also *Taylor* vs. *United States,* (C.C.A. 9, 1950) 179 F.2d 640, wherein the Court held that an affidavit of bias and prejudice filed in the district court on a motion to set aside judgment and sentence would not be timely.

In this case there is a total lack of showing of any facts upon which diligence might be inferred. The same diligence which produced the affidavit within a few days after affirmance of the defendants' convictions upon appeal could doubtless have produced it at any prior time. That the existence of prostitutes as

a source of affidavits had occurred to the defendants at a much earlier stage in these proceedings is shown in the affidavits upon the original motion for a new trial wherein deputy marshals were charged with misconduct.

A further defect in the motion to disqualify is the failure of the motion to be accompanied by a proper certificate of good faith executed by counsel of record. In this the Court is not referring to the issue of fact that may exist as to the truth or falsity of the certificate of good faith, although the existence of an issue of fact upon the certificate has never been ruled upon by the appellate courts. (*Berger* vs. *United States*, supra, was limited to the non-contestability of the affidavit of bias.) Rather, the Court is referring to the fact that counsel of record for the defendant Hoffa upon the trial of this case was Attorney Harry Berke, and that Mr. Berke has not joined in the certificate of good faith on behalf of the defendant Hoffa stating his belief in the truth of the affidavit of Marie Monday. James Haggerty, Sr., an attorney of Detroit, Michigan, has filed the certificate of good faith along with Harold E. Brown, an attorney of Chattanooga, Tennessee. Mr. Haggerty is not a member of the bar of this court. Mr. Brown, while a member of the bar of this court, was not the attorney of record for the defendant Hoffa upon the trial of the case, but rather was the attorney of record for the defendant King. The omission of the certificate of good faith upon the part of counsel of record for the defendant Hoffa at the time of the trial is a significant omission.

The requirement that local counsel of record in the trial of the case execute the certificate of good faith is not a technical one. Rather, it is a matter of substance. Counsel not admitted to practice in this court but appearing only specially in one case for one de-

fendant, is obviously not subject to the same restraint as an attorney who regularly practices before the Court and would not be as liable to use the care and restraint of an attorney regularly practicing in the court. The present case is a classic example of this fact. Mr. Haggerty has filed a telegram in which he authorizes an attorney in Washington, D.C., who has never been an attorney of record in this case, as follows:

> "YOU ARE HEREBY AUTHORIZED TO AFFIX MY SIGNATURE ON ALL PAPERS AND DOCUMENTS IN CONNECTION WITH THE CASE OF THE UNITED STATES VERSUS JAMES R. HOFFA, ET AL IN THE UNITED STATES DISTRICT COURT IN CHATTANOOGA, TENNESSEE."

Even in this electronic era, practice by wire has yet to be fully accepted by the Courts as a substitute in all situations for personal presence.

As with counsel not admitted, likewise so it is with counsel, who, though admitted to practice in this court, was not counsel of record at the time of the trial but who rather was hired specifically to file the certificate of good faith. It is obvious that such counsel will not be in position to make as meaningful a certificate of good faith as would counsel of record in the trial and further would not be as likely to use the care and restraint in certifying good faith as would otherwise be the case were his employment not directly related to the filing of the certificate, and that only.

In the case of *Currin* vs. *Nourse,* (C.C.A. 8, 1934) 74 F. 2d 273 at page 275, the Court stated:

> "... The section of the applicable statute (section 21 Judicial Code, title 28 USCA Sec. 25) provides that 'no such affidavit [an affidavit of bias and prejudice] shall be filed unless accompanied by a certificate of counsel of record that such affidavit

and application are made in good faith.' The phrase 'counsel of record' in the statute means an attorney at law admitted to the bar in the case. One who is not a member of the bar cannot be counsel of record even though the record on its face may show he had undertaken to appear as counsel. Since Mr. Payne was not on the date of the filing of either of the affidavits a member of the bar of the court, he could not then or at any earlier time have been counsel of record in the case for either of the affiants. The purpose of the provision of the statute requiring certificate of good faith by counsel of record is that the court may be assured that the affidavit is made in good faith through the certificate to that effect made by one who is a sworn officer of the court, regularly admitted as an attorney to practice at the bar of the court. The requirement is not technical. It is one of the essential requirements of the statute. As the affidavits were not certified to be made in good faith by counsel of record, the motions to strike them for insufficiency in law were properly sustained and Judge Otis 'having,' as he stated, 'no consciousness whatever of any prejudice against any of the parties or in favor of any,' the duty to continue with the hearing on the matter of confirmation on the sale remained upon Judge Otis. *Klose* v. *United States,* (C.C.A. 8) 49 F.(2d) 177; *Cuddy* v. *Otis,* (C.C.A. 8) 33 F.(2d) 577; *Morse* v. *Lewis,* (C.C.A. 4) 54 F.(2d) 1027; *Saunders* v. *Piggly Wiggly Corp.,* (D. C.) 1 F.(2d) 582; *Benedict* v. *Seiberling,* (D.C.) 17 F.(2d) 831; *Ex parte Fairbank Co.,* (D. C.) 194 F. 978."

See also the cases of *Mitchell* vs. *United States,* 126 F. 2d 550 at page 552; *Beland* vs. *United States,* 117

F. 2d 958 at page 960; *United States* vs. *Garden Homes, Inc.*, 113 F. Supp. 415 at page 418; *United States* vs. *Onan*, 190 F. 2d 1 at page 6; and *Freed* vs. *Inland Empire Ins. Co.*, 174 F. Supp. 458, which stand for the proposition that the requirement of the statute is founded on the assumption that a member of the bar will not indulge in reckless disregard of the truth and therefore attest to the good faith and belief of affiant and that one may not be counsel of record unless a member of the bar of the Court before which appearance is made.

Counsel of record has an obligation to the Court as well as to his client, and a public duty to aid the administration of justice, to uphold the dignity of the Court and respect its authority. *United States* vs. *Gilboy*, 162 F. Supp. 384; *United States* vs. *Onan*, 190 F. 2d 1; and *Bishop* vs. *United States*, 16 F. 2d 410.

With respect to the motions and affidavits filed upon behalf of each of the defendants other than defendant Hoffa, there is no allegation of any bias or prejudice personal to any defendant other than defendant Hoffa. The affidavits of bias filed on behalf of the defendants Campbell, Parks, and King merely adopt by reference the affidavit of Marie Monday filed in the Hoffa motion. These affidavits do not purport to set forth any alleged remarks of the Court with respect to these three defendants. The statute requires that the affidavit of bias show that the judge "has a personal bias or prejudice either against him or in favor of any adverse party". The affidavits here involved do not specify any bias or prejudice of this Court personal to the defendants Campbell, Parks, and King, even when the affidavits are held to be incontestable for falsity. As stated by the Court in *Price* vs. *Johnson*, 125 F. 2d 806 at 811:

> ". . . The plain purpose of the statute 'was to afford a method of relief through which a party

to a suit may avoid trial before a judge having a personal bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against suitor making the affidavit or in favor of his opponent.' "

See also *Knapp* vs. *Kinsey,* (C.C.A. 6, 1956) 232 F. 2d 458 at 466; *Hurd* v. *Letts,* 152 F. 2d 121; *Eisler* vs. *United States,* 170 F. 2d 273 at page 278; *Johnson* vs. *United States,* 35 F. 2d 355; and *United States* vs. *Gilboy,* 162 F. Supp. 384.

Finally, although since this Court is the object of the attempted defamation here sought to be practiced, it does not cast its opinion denying the motion to disqualify upon this ground, the law is well settled that the affidavit of bias and prejudice must be sufficient to fairly convince a sane and reasonable mind that such attitudes on the part of the attacked judge do exist. *Fieldcrest Dairies* vs. *City of Chicago,* 27 F. Supp. 258. It is inconceivable that a sane and reasonable mind could believe that this Court during the course of this trial would meet in a public facility with a self-admitted prostitute who was a total stranger and make such expressions as she has sworn to. Surely a judge of the United States of America cannot be prevented by such patent perjury from performing his duty in accordance with the law. Certainly this United States Judge, by such attempted defamation, will neither be deterred from doing his duty in accordance with the law, nor will he be pressured into doing anything but his duty in accordance with the law. Each defendant will continue to receive every right accorded him under the law.

As stated in the case of *In re Union Leader Corp.*, (C.C.A. 1, 1961), 292 F. 2d 381, cert. den. 368 U.S. 927:

> "There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is. See *Tucker* v. *Kerner*, 7 Cir., 1950, 186 F. 2d 79, 85; *Sanders* v. *Allen*, D.C.S.C. Cal. 1944, 58 F. Supp. 417, 420, appeal dismissed, 9 Cir., 1945, 151 F. 2d 534."

The motion to disqualify filed on behalf of each defendant will be overruled and the motion to strike the same sustained.

An order will enter accordingly.

FRANK W. WILSON,
United States District Judge.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

Criminal No. 11,989

UNITED STATES OF AMERICA

vs.

JAMES R. HOFFA, THOMAS EWING PARKS, LARRY CAMPBELL, AND EWING KING

OPINION

(November 12, 1965)

The defendants were indicted under the Federal Obstruction of Justice Statute (18 U.S.C. 1503) upon May 9, 1963, and charged with willfully endeavoring to influence, intimidate, and impede jurors in the discharge of their duties. After lengthy proceedings, including two petitions by the defendants to the Court of Appeals for mandamus, each of which petitions was denied, the case went to trial upon January 20, 1964. After seven weeks of trial, the jury returned a verdict of guilty against the defendants, Hoffa, Parks, Campbell and King, and acquitted two other co-defendants.

The case is now before this Court upon the defendants' motion for new trial, the present motion, based upon alleged newly discovered evidence, having been filed upon September 1, 1965. This is the third motion for new trial filed by the defendants, and the second motion based upon alleged newly discovered evidence. The original motion for new trial, asserting 92 grounds, was filed upon March 10, 1964. This motion was overruled by opinion of the Court filed April 8, 1964, and

at the time that it was set for argument in the Court of Appeals, the defendants filed their second motion for new trial, this motion being based upon allegedly newly discovered evidence. This second motion was initially filed in the Court of Appeals and a stay sought in the original appeal pending its disposition, but the stay was denied. This Court overruled the second motion for new trial by an opinion filed April 8, 1965, and the appeal is presently pending in the Court of Appeals. In the meantime, the Court of Appeals affirmed the conviction of the defendants upon the initial appeal upon July 29, 1965. Shortly thereafter the defendants filed the present motion for new trial upon September 1, 1965, being the third such motion filed and the second motion to be based upon alleged newly discovered evidence.

Along with the present motion for new trial, the defendants filed a motion seeking to disqualify the undersigned as the presiding judge and alleging bias at the time of the trial as the grounds therefor. This Court overruled the motion to disqualify for the reasons set forth in the opinion filed September 22, 1965. The defendants have now filed a further motion to disqualify the undersigned as the presiding judge and a motion to stay the entry of an order upon the former motion for disqualification pending reconsideration of the initial motion to disqualify.

Taking up the defendants' motion to reconsider the former motion for disqualification, the Court is of the opinion that this motion should be overruled. The motion to reconsider raises no matters that were not fully covered in the opinion of this Court filed September 22, 1965.

Considering next the defendants' motion for disqualification filed September 27, 1965, this motion does not purport to be based upon alleged bias, nor to be

brought in accordance with 28 U.S.C., Sec. 144, but contends rather that by reason of the allegations of bias in the new trial motion, the undersigned should disqualify himself under 28 U.S.C., Sec. 455, as having an interest in or being a witness to issues of fact raised in the motion for new trial. Thus, by allegations of bias in the motion for new trial, the defendants seek to accomplish what they are not entitled to accomplish upon a motion to disqualify for alleged bias under 28 U.S.C., Sec. 144, the statute specifically providing for the disqualification of a trial judge for alleged bias. Obviously, such an evasion of the law cannot thus be accomplished, nor can the administration of justice thus be thwarted. If the defendants could by the mere allegation of bias in the motion for new trial accomplish the removal of a trial judge, when no grounds exist for his disqualification under the statute providing for removal for alleged bias, the defendants could not only evade the law relating to the disqualification of a judge for bias, but could by the simple expedient of including in the motion for new trial allegations of bias against each judge scheduled or designated to hear the motion accomplish the removal of every judge, both trial and appellate, in the federal court system, and thereby prevent any disposition of his motion from ever being made.

Furthermore, an allegation of bias upon the part of a trial judge first asserted in a motion for new trial does not, as a matter of law, assert any ground for new trial nor raise any issue of fact. The issue on a motion for new trial is whether error was committed in the trial of the case. In this case the trial record has now been fully and carefully reviewed by the appellate court and found to be without error. An allegation of bias made after completion of the trial and not reflected in any error made in the trial of the case

cannot, as a matter of law, constitute a ground for new trial. Thus, an allegation of bias in a motion for new trial raises no issue of fact upon which the trial judge might be called as a witness nor be disqualified under 28 U.S.C., Sec. 455. The defendants' motion for disqualification filed September 27, 1965, will accordingly be overruled.

Turning the attention of the Court next to the motion for new trial, as noted above, this motion purports to be based upon newly discovered evidence and is made in accordance with Rule 33 of the Federal Rules of Criminal Procedure, which permits the filing of such motions within two years after the trial. In view of the fact that this case is now pending upon petition for certiorari to the United States Supreme Court from the action of the Court of Appeals in affirming the conviction of the defendants, as well as pending in the Court of Appeals upon the defendants' appeal from the action of this Court overruling the second motion for new trial, this Court would be without jurisdiction to grant the motion for new trial except upon remand of the case. However, the trial court does have jurisdiction to hear the motion and determine whether a request for remand should be made, even though the case is pending upon appeal.

The present motion sets forth three principal grounds as the basis for the motion. It is first contended that the defendants have obtained newly discovered evidence of misconduct upon the part of the United States Marshals in their care, custody and contact with the jury during the trial of the case. It is next contended that the defendants have obtained newly discovered evidence of misconduct upon the part of jurors, both before and during the trial of the case. Finally, it is contended that the defendants have obtained newly discovered evidence of bias upon the part of the trial judge alleged

to have existed at the time of the trial. As noted above, this latter ground does not as a matter of law constitute a ground for new trial, so that it need not further be considered. Much that was said by the Court in its opinion upon the motion to disqualify would be relevant here, however, including the lack of any showing of diligence upon the part of the defendants.

The allegations of misconduct made against the marshals and jurors, generally stated, are that the marshals provided and the jurors used the services of prostitutes during the trial, that the jurors were improperly provided with alcoholic beverages and other favors during the trial, and that improper communications and statements of prejudice against or guilt on the part of the defendant Hoffa were made to and by the jurors both before and during the trial. The defendants seek to support these allegations of misconduct upon the part of the marshals and jurors by the affidavits of four women who identified themselves as prostitutes, two men who identify themselves as procurers, and six men who identify themselves as employees at the plant where two jurors work. The remaining affidavits filed by the defendants are those of the defendant Hoffa, one of his assistants, and two of his attorneys. These affidavits relate to when and how the affidavits of the prostitutes, the procurers and the fellow employees were obtained. Thus, the alleged newly discovered evidence proffered by the defendants does not relate to the guilt or innocence of the defendants, but rather purports to show that the trial was at the hands of immoral and prejudiced persons, and not good and lawful men and women jurors.

In response to the defendants' motion, the Government has filed a large number of affidavits, including the affidavits of eleven of the twelve trial jurors (one juror being presently critically ill), each of the four

alternate jurors, the marshal and each of the deputy marshals who assisted in the care and custody of the jury during the trial or had any contact with the jury.

These affidavits specifically and categorically deny each and every act of alleged misconduct, deny any knowledge of or contact with any prostitute, deny the presence of any unauthorized person in the quarters where the jury was sequestered or any communication with any such persons, deny any statements prejudicial to the defendant either made by any juror or in the presence of any juror at any time and deny that any juror had formed or expressed any opinion prejudicial to the defendant prior to the deliberations of the jury.

Upon the basis of the allegations in their motion and supporting affidavits, these defendants seek to be permitted to produce and examine witnesses. It appears, however, that the motion can properly be decided upon the present record, and this for two reasons. In the first place, it appears conclusively on the face of the record that the defendants' motion is legally insufficient to warrant the granting of a new trial. The law is clear that to support a motion for new trial on the ground of newly discovered evidence, the evidence must not only be newly discovered, but it must be made to appear that the failure to discover it sooner was not due to a lack of due diligence upon the part of the defendants. *Pitts* v. *United States,* 263 F. 2d 908 (C.A. Alaska, 1959) cert. denied 360 U.S. 919, rehearing denied 361 U.S. 857; *Fernandez* v. *United States,* 329 F. 2d 899, 904 (C.A. 9), cert. denied 379 U.S. 832; *Farina v. United States,* 302 F. 2d 95, 112-114 (C.A. 8), cert. denied, *sub nom. Cardarella* v. *United States,* 371 U.S. 819; *Mills* v. *United States,* 281 F. 2d 736, 739 (C.A. 4); *United States* v. *Costello,* 255 F. 2d 876, 879-881 (C.A. 2), cert. denied, 357 U.S. 937. Not only were many of the allegations of misconduct now asserted to

be newly discovered raised by the defendants in their original motion for new trial, but there is a total lack of showing of any facts upon which diligence might be inferred.

In their original motion for new trial, the defendants alleged misconduct upon the part of marshals and jurors of much the same nature as is now alleged. The action of this Court in finding such charges in the original motion wholly without merit has now been affirmed by the Court of Appeals. Furthermore, from the record upon that motion it appeared that bellboys were offered or received large sums of money to give affidavits charging misconduct upon the part of marshals and jurors. Also at that time one lady juror was charged with making statements in Chattanooga, Tennessee, with reference to jury misconduct at a time when she was in fact in the State of Florida.

With regard to diligence, the present record is totally devoid of any showing that the evidence now presented as newly discovered could not have been discovered and produced at any time the defendants chose to do so. From the defendants' own affidavits, it appears that O'Brien, an assistant to defendant Hoffa, came to Chattanooga immediately after the Court of Appeals had affirmed the conviction of the defendants and within a matter of a few days had located and taken to the defendants' attorneys the four prostitutes, the two procurers, and the six employees whose affidavits are now alleged to constitute newly discovered evidence of misconduct upon the part of the marshals and jurors. Although the affidavit of the defendant Hoffa and one of his attorneys indicates that each heard "rumors" of jury misconduct at the time the verdict was returned, there is no allegation that they ever attempted to contact the present witnesses until 17 months after the trial and until the Court of Appeals

had affirmed the convictions. There is likewise no explanation of how they were able to find the witnesses so promptly after the conviction was affirmed. The Court can only conclude that the diligence displayed by the defendant Hoffa's assistant, O'Brien, immediately after the convictions were affirmed could have located and produced the same witnesses at any earlier time that the defendants may have chosen to send O'Brien to Chattanooga for that purpose.

Wholly aside from whether the present motion alleges any "newly discovered evidence" or whether due diligence is shown in procuring such evidence, the Court can and will however decide the factual issues raised by the present motion for new trial on the basis of the affidavits and counter-affidavits filed herein. The law is well settled that a motion for new trial based upon newly discovered evidence may be decided by the Court upon the affidavits and counter-affidavits filed in support and opposition to the motion. *United States* v. *Johnson,* 327 U.S. 106; *United States* v. *Astore,* 309 F. 2d 144 (C.A. 2); *Lyles* v. *United States,* 272 F. 2d 910 (C.A. 5); *Stern* v. *United States,* 260 F. 2d 365 (C.A. 6); *United States* v. *Troche,* 213 F. 2d 401 (C.A. 2); *Ewing* v. *United States,* 135 F. 2d 633 (C.A., D.C.); cert. denied 318 U.S. 776; *Hillman* v. *United States,* 192 F. 264 (C.A. 9) cert. denied 225 U.S. 699.

Accordingly, upon the basis of the affidavits and counter-affidavits filed with regard to the present motion for new trial, the Court makes the following findings of fact:

(1) That no juror nor alternate juror who participated in the trial of this case was at any time furnished a prostitute by any United States Marshal or Deputy United States Marshal, nor did any juror at any time during the trial of this case have any contact with or engage in any conversation with any prostitute, in-

cluding Patsy Jo Harris, Catherine Johnson, Troyce Dean Henry, Bobbie Ann Sells, and Marie Monday.

(2) That no United States Marshal or Deputy United States Marshal at any time during the trial of this case made any remark prejudicial to the defendant to or in the presence of any juror.

(3) That no United States Marshal nor Deputy United States Marshal provided any juror with alcoholic beverages or bestowed other gifts or favors upon any juror, nor did anything calculated to influence the decision of the case by the jury either in favor of or against any party in the case.

(4) That no unauthorized separation of the jury occurred during the trial of the case and that at no time during the trial of this case was any juror out of the presence of a United States Marshal or Deputy United States Marshal duly sworn to have custody of the said jury.

(5) That no juror at any time prior to the case being submitted to the jury for decision discussed the evidence in this case with anyone or expressed any opinion as to the guilt or innocence of any defendant, nor did any juror make any comment or express any prejudice against any defendant in the case prior to the rendition of the verdict, nor was any statement or comment prejudicial to any defendant made by any third party to or in the presence of any juror during the trial of the case.

(6) That neither juror Starnes, McConnell, nor Kilgore expressed any prejudice against or opinion as to the guilt or innocence of any defendant in this case prior to being selected upon the jury, nor did any such juror fail to fully and truthfully respond upon his respective voir dire examination.

(7) That the United States Marshals and Deputy United States Marshals at all times while in attendance

upon the jury and each juror at all times during the course of his or her jury services conducted himself or herself in accordance with the instructions of the Court, which instructions were given in open court and the same appear of record in the trial of the case.

The foregoing findings of fact are based upon and supported by the unequivocal and categorical affidavits of each of the fifteen jurors and the affidavits of each and every United States Marshal or Deputy United States Marshal who had any custody of or contact with any juror during the trial of this case. They are not refuted by the signatures upon the affidavits of four women who admit selling their bodies, if not their signatures, for immoral purposes for $20.00. Neither are they refuted by the affidavits of two procurers for prostitutes who do not purport to identify any juror as having engaged in any misconduct. Neither are they refuted by the affidavits of fellow employees of two jurors who identify themselves as union sympathizers and believe such jurors to be hostile to unions. In this regard, the Court cannot overlook the fact that immediately after the employee, Isenhower, gave an affidavit to the defendants, which was represented as being freely and voluntarily given, accusing the juror Kilgore of perjury on his voir dire, the same employee, Isenhower, invited the said juror to a social affair at which alleged statements of jury misconduct were made by the juror, which alleged statements form the basis of the affidavits promptly filed with the defendants by the employees, Isenhower, Horton and Bull. Such diligence, if not deviousness, in producing evidence would hardly be attributed to a witness who claims to be totally disinterested.

For the reasons hereinabove set forth, the Court is of the opinion that the defendants' motion for new trial is without merit. No request for remand of the case

will be made. An order will enter accordingly. Likewise, in accordance with this opinion and in accordance with the opinion of the Court entered upon September 22, 1965, orders will enter overruling both motions of the defendants to disqualify the undersigned as the trial judge in this case and overruling the defendants' motion to stay entry of an order accordingly.

ENTER:

FRANK W. WILSON,
United States District Judge.

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